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No. 94-

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WINCHESTER HOMES, INC.,
Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This products liability action for damages arose out of Petitioner's purchase and subsequent installation of Respondents' defective fire retardant treated plywood into townhomes built by Petitioner, which were then subsequently sold by Petitioner to homeowners. In denying appellate review of this case, the Supreme Court of Virginia held that it was not reversible error for the trial court to wholly deny standing to Petitioner, both in its own right and as assignee of the homeowners, despite the existence of statutory authorization to bring such an action for damages under Virginia law.

In view of the foregoing, the following questions are presented in this petition:

(1) Is initial access to the courts in a civil case a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the Constitution?

(2) Did the trial court's refusal to recognize standing deprive Petitioner, in its own right and/or as assignee of the homeowners, of its recognized right of access to the courts to maintain a cause of action authorized by the state's legislature?

(3) If so, did the trial court's deprivation of Petitioner's right of access to the courts to maintain a cause of action authorized by the state legislature constitute a violation of a fundamental right so as to trigger a higher level of review of the state action under a substantive due process analysis?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of Virginia were Winchester Homes, Inc. (as petitioner); and Hoover Universal, Inc., Johnson Controls, Inc., Ply Gem Industries, Inc., Reliance Wood Preserving, Inc., Mid-Atlantic Wood Preservers, Inc., Hoover Treated Wood Products, Inc., Allied Plywood Corporation, Jarvis Steel and Lumber Co., Inc., and McCoy Lumber Company (as respondents).

The Petitioner before this Court is Winchester Homes, Inc. Pursuant to Rule 29.1 of this Court, Petitioner states that the following are the names of its respective parent companies: Winchester Homes, Inc. is a wholly owned subsidiary of Weyerhaeuser Real Estate Company. Weyerhaeuser Real Estate Company is a wholly owned subsidiary of Weyerhaeuser Company. Winchester Homes, Inc. has no subsidiaries or affiliates.

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Winchester Homes, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The two unreported decisions of the Supreme Court of Virginia appear at App. 1a and App. 2a. Likewise, the relevant unreported standing decisions of the Circuit Court of Fairfax County appear at App. 3a, App. 8a, and App. 19a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1988). The decision of the Supreme Court of Virginia was rendered on March 2, 1994. (App. 1a). On April 15, 1994, a timely petition for reconsideration was denied. (App. 2a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Suit Below

On November 2, 1990, Winchester commenced this products liability lawsuit in its own right in the Circuit Court of Fairfax County, Virginia to recover its damages as a result of its purchase of the Respondents' defective products.

Winchester, a builder of residential homes, purchased Respondents' defective fire retardant treated plywood ("FRT plywood"), and before the defect became apparent, installed the FRT plywood into the roofs of over 1,300 Virginia townhomes. Thereafter, following the sale of the townhomes Winchester received reports of the degradation of the FRT plywood, threatening the structural integrity of the roofs and the safety of the homeowners.[1] Winchester inspected and replaced the defective FRT plywood to avoid potential injury (and the resulting liability) to the townhome owners as well as to protect its reputation as a builder. It seeks, as compensatory and consequential damages, the costs for the inspection and replacement of the defective FRT plywood.

The core issue in this case is standing, as a function of the due process right of access to the courts.[2] As a

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[1] Experts retained by Winchester determined that the FRT plywood was inherently defective due to the chemicals applied by the respondents to the plywood to make it fire retardant, thus causing the FRT plywood to prematurely degrade at an accelerated rate.

[2] Standing is concerned with the concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merit of the claim advanced. Winchester's standing is

threshold matter, the trial court below held that Winchester had no right to present its claims for damages. During the initial pleading stage, the trial court erroneously ruled that Winchester lacked the requisite standing in its own right to sue Respondents for damages arising from the purchase of the defective goods. Ignoring the fact that the FRT plywood was admittedly "goods" at the time Winchester made its purchases, the court denied Winchester's standing solely because Winchester no longer owned the defective FRT plywood after it had been incorporated into the townhome roofs. Despite Winchester's absolute right to bring its case under Virginia's enactment of the Uniform Commercial Code, and pursuant to Winchester's right to protect its own business reputation, the court held that the owners of the townhomes with the defective FRT plywood, not Winchester, were the parties with the proper standing to sue Respondents. In an admittedly "unusual" judicial action, the court granted Winchester leave to amend certain counts, on the condition that it obtain written asignments of the homeowners'

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determined only by whether it "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 72 (1978). "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). "Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court; and it eschews evaluation of the merits. The court is not to consider the right or significance of the alleged injury, only whether it exists." *Coalition for Env't v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974). The Virginia Supreme Court has recognized that "standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." *Andrews v. American Health and Life Ins. Co.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988).

rights,[3] and thereafter structured the case as a breach of warranty case pursued by right of assignment.[4]

Winchester obtained the written assignment of rights from almost all of the 1300 Virginia homeowners in whose townhomes it had installed the Respondents' FRT plywood. Subsequently, Winchester, as assignee of the homeowners, prevailed against respondent Hoover Treated Wood Products, Inc. ("Hoover Treated")[5] at trial and was awarded damages by a jury in the amount of $434,185 for that Respondent's breach of express and implied warranties *to Winchester*. Shortly thereafter, however, the trial court entered judgment notwithstanding the verdict (JNOV) against Winchester on the grounds that Winchester also lacked the requisite standing to assert a valid cause of action as the assignee of the homeowners' rights. While noting that Virginia's anti-privity statute allowed UCC warranties to extend down the chain of distribution to a plaintiff whom might reasonably be affected by the goods, the court inexplicably turned its focus away from the purchases of the defective FRT plywood—the good which was the subject of the lawsuit—and to the purchase of the townhomes. The court erroneously concluded that the FRT plywood should now be deemed "realty" rather than "goods" because at the time of the lawsuit the FRT plywood was incorporated into the homeowners' roofs.[6]

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[3] *See* Transcript of Hearing, August 15, 1991, at 21-27. (App. 25a).

[4] Winchester's tort causes of action were dismissed on the grounds that "negligent design and manufacture is the manner in which the defendants allegedly breached these warranties," and its statutory claim pursuant to the Virginia Consumer Protection Act was also dismissed at the initial pleadings stage. (App. 3a).

[5] Over Winchester's objection, shortly prior to trial the trial court ordered that Winchester's case would be severed into separate trials for each defendant. For tactical reasons, Winchester chose to proceed first against Hoover Treated.

[6] This ruling in particular should be closely scrutinized in light of the specific type of good at issue. FRT plywood is a good spe-

The effect of the trial court's rulings regarding Winchester's standing is that no individual or entity has the ability to exercise the right to sue Respondents in the courts of the Commonwealth of Virginia for the damage caused by the defective FRT plywood. The paradoxical result is that no one, neither the purchaser of the goods nor the homeowners affected by those goods, has the most basic and fundamental right of access to the courts to seek a remedy for injury and damages caused by a good determined by a jury to be defective.

B. The Supreme Court of Virginia's Decisions

On March 2, 1994, the Supreme Court of Virginia summarily determined that none of the trial court's rulings, including those addressing Winchester's standing, were "reversible error", and accordingly refused to hear Winchester's appeal.[7] No explanation or reasoning was provided in the court's two sentence order; no opinion was issued. (App. 1a).

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cifically manufactured by Respondents for use by home builders for future incorporation into homes; and Respondents knew that is why Winchester bought it. If, as the trial court contends, the FRT plywood ceases to be a "good" upon its installation into the townhomes, then the court's two standing rulings effectively abrogate the warranty causes of action provided by the Virginia Legislature in the UCC and strip Winchester of all access to a judicial mechanism to advance such claims, because, under the court's analysis, the warranties afforded under Virginia law would not be enforceable by anyone—either the purchaser or the ultimate party affected by the good. Because neither the trial court nor the respondents demonstrated that the Virginia Legislature excluded the sale of FRT plywood (or any other good specifically designed for future incorporation into a dwelling) from the type of transactions the UCC warranties were designed to protect, such a result is inherently unjustifiable.

[7] Virginia has no automatic right of appeal in general civil cases such as Winchester's. The jurisdiction of the Virginia Court of Appeals is limited to administrative agency, domestic relations and workmen's compensation cases; other civil cases require the granting of a Petition by the Supreme Court of Virginia.

Thereafter, Winchester petitioned the Supreme Court of Virginia to reconsider its decision not to accept Winchester's appeal. In its Petition for Rehearing, however, Winchester relied almost exclusively on its standing arguments to persuade the supreme court to examine the admittedly "unusual" judicial actions taken by the lower court.[8] In demonstrating why the trial court's denial of its standing constituted reversible error, Winchester asserted that "the reversible error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States" because it was deprived of its—and the homeowners'—right to assert a cause of action authorized by the Virginia General Assembly. *See* Winchester's Petition for Rehearing, at 12. (App. 40a-41a). Moreover, Winchester specifically argued that the Supreme Court of Virginia's failure to find "reversible error" constituted an unconstitutional denial of Winchester's fundamental right of access to the courts.

> [The Virginia Supreme] Court is accepting the trial court's express rejection of the sole authority of the legislature to make the law of Virginia, and by doing so has denied Winchester's access to the court system. This access is guaranteed by the constitutions of Virginia and the United States and is a fundamental right, the denial of which must be recognized as reversible error.

Id. at 14. Nonetheless, on April 15, 1994, Winchester's petition to set aside the judgment and grant a rehearing was denied. (App. 2a).

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[8] As Winchester noted in its Petition for Rehearing, one of the primary reasons underlying its heavy reliance on the issue of standing was that the legal doctrine of standing establishes a threshold entitlement to judicial action, and hence, the other reversible errors "flowed" from the trial court's decision to deny Winchester standing despite a legislative mandate to the contrary. *See* Winchester's Petition for Rehearing, at 12 & n.4. (App. 40a-41a).

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW VIOLATE THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE VIRGINIA COURTS HAVE DEPRIVED WINCHESTER OF ITS FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS TO MAINTAIN A CAUSE OF ACTION PROVIDED BY THE VIRGINIA LEGISLATURE.

A cause of action for damages is a property right and cannot be taken without due process. *In Re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 (3rd Cir.), *cert. denied sub nom., Chicago Title Inc. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Here, because of the Virginia courts' denial of standing Winchester has been deprived of any procedure by which to proceed with its claim, a claim authorized by the Virginia General Assembly. The errors made by the state courts also translate into a substantive deprivation of Winchester's due process rights under the Fourteenth Amendment.

Throughout this case, standing has been and remains the core issue, for the trial court ruled at the beginning of the case that Winchester did not have standing in its own right as the purchaser of the defective FRT plywood, and, after the trial was over, that Winchester did not have the standing to sue Respondents as the assignee of the homeowners. This judicially-created standing rule has violated Winchester's constitutional rights because it has completely denied Winchester, in its own right and as the assignee of the homeowners, its right to a day in court to litigate a cause of action provided by the Virginia Legislature. Despite that due process requires that a

litigant at least be allowed to raise claims for relief and damages that are provided under applicable common and/or statutory law, the trial court ran roughshod over Winchester's rights by failing to acknowledge its basic standing to advance its claims in court. This is particularly significant because standing is of such a threshold magnitude that its determination pre-empts issues such as jurisdiction, consideration of applicable statutes of limitations and/or other claim barring procedures or defenses, and the merits of a case. In short, if one is barred from the courtroom for lack of standing, all other aspects of, or need for, the judicial system become insignificant and inconsequential.

The Virginia General Assembly established Winchester's standing in this case, and the trial court's ruling that Winchester lacked standing because it no longer owned the FRT plywood is clearly erroneous. The Virginia Code defines a "buyer" as "a person who buys or contracts to buy goods," § 8.2-103(1)(a), and "goods" are defined as "all things . . . which are moveable *at the time of identification to the contract for sale.*" Va. Code Ann. § 8.2-105(1) (emphasis added). It is undisputed that *at the time of purchase* Winchester was a "buyer" and the FRT plywood was a "good" within the meaning of the Virginia Code. As a buyer of goods, Winchester is entitled to recover for damages for breach of warranty, including incidental and consequential damages, *i.e.*, the costs associated with the inspection and repair of the townhome roofs necessitated by the defective FRT plywood. *See* Va. Code Ann. §§ 8.2-714, 715.

The fact that Winchester purchased the goods for incorporation into the townhome roofs does not remove that original purchase transaction from the scope of the UCC.[9]

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[9] The trial court, not Winchester, erroneously shifted the focus of the case from Winchester's purchase of a good, the FRT plywood, to the homeowners' purchase of a townhome. Likewise, it was the trial court that denied Winchester's standing in its own right, forcing it to proceed as assignee of townhome owners. Had Win-

The Virginia Code states that "each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective of title to goods* except where the provision refers to such title," Va. Code Ann. § 8.2-401 (emphasis added), and neither the definition of a buyer nor the other provisions applicable to Winchester's purchase make any reference to title of the goods. In fact, the Code

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chester's original pleadings been accorded as they were entitled to be, this unnecessary shifting of focus would not have occurred because Winchester would have been permitted to pursue its claims in its own right. Moreover, the common law causes of action available to Winchester in its own right, but not as assignee of the homeowners, would have survived the trial court's erroneous classification of FRT plywood as realty. Thus, to reiterate, the JNOV ruling serves only to magnify the original error of denying Winchester standing in its own right.

Winchester can only surmise that the focus of the case was shifted from its purchase of the defective FRT plywood to the townhomes because the townhomes became so integral to other issues in the case, thus leading to confusion about the correct subject of Winchester's cause of action. While the trial court's apparent confusion may be understandable, it is legally and intellectually void. This case is about the purchase of plywood, not the purchase of townhomes. If the nature of the degradation of the FRT plywood had become known to Winchester before it was used in the townhome construction, no party could contend that Winchester did not have standing to sue. In fact, respondent Hoover Treated admitted this point: "HTWP agrees that a 'buyer' has standing to sue under the UCC . . . ['buyer' means a person who buys or contracts to buy goods]. Indeed, if Winchester was the 'buyer' whose rights were litigated in this action, *it would have standing to sue.*" Hoover Treated's Reply Brief for its Motion for JNOV, at 2 (emphasis added) (App. 45a). Thus, it is clear that under Virginia law Winchester is the buyer whose rights should be litigated in this action.

Winchester recognizes that issues of state law are generally outside this Court's consideration. Nevertheless, Winchester has set forth the basis for its claims for standing above in order to demonstrate that the legislature has conferred a statutory right to maintain a cause action against Respondents. Such a showing is a predicate for Winchester's constitutional argument.

contemplates that a buyer may resell goods, and expressly allows consequential damages for any loss after resale. Va. Code Ann. § 8.2-715(2)(a) cmt. 6 (1991).[10] In the face of such unmistakable standing rights granted by the Legislature, it was error for the trial court to deny Winchester's standing in its own right and as assignee of the homeowners.

Indeed, under the trial court's analysis, no party can assert a cause of action arising out of a sale of defective FRT plywood that would withstand the trial court's interpretation of the standing doctrine—despite a mandate by the Virginia General Assembly to the contrary. By this construction, the Virginia court invaded the province of the Virginia Legislature by effectively rendering meaningless section 8.2 of the Virginia Code,[11] and consequently deprived Winchester of its fundamental right of access to the court to seek the only existing remedy for its injuries.

A. Procedural Due Process

This Court, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), specifically recognized that this type of deprivation violates the procedural safeguards of the Fourteenth Amendment.

In *Brinkerhoff-Faris*, petitioner brought an action in equity to protest against an allegedly discriminatory tax. *Id.* The Missouri courts denied petitioner relief on the grounds that it had failed to seek an administrative rem-

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[10] *See Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3rd Cir. 1990); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959); Ronald A. Anderson, *The Uniform Commercial Code* § 2-103:6 (3rd ed. 1981).

[11] In *Moody v. Southern Railway Co.*, 169 Va. 765, 768, 194 S.E. 679, 681 (1938), the Virginia Supreme Court held: "This court cannot ignore a solemn legislative enactment. If the statutes are legally sound, in that they cannot be successfully assailed for some adequate cause, constitutional or otherwise, then the court cannot alter or abrogate them by interpretation or construction."

edy which, in fact, did not exist until the Missouri Supreme Court recreated it, on petitioner's very appeal, at which point it was too late to be pursued. *Id.* at 679. Ironically, the administrative remedy had not previously existed because, six years earlier, the Missouri Supreme Court had ruled that the state tax commission was powerless to entertain claims like that presented by petitioner. Writing for this Court, Justice Brandeis held:

> The violation is nonetheless clear when [the deprivation of plaintiff's property without affording it an opportunity to seek a remedy] is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative branch of government.
>
> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state . . . and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits. . . . *Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support.* Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; . . . [b]ut, *while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing,*

> *accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-82 (1930) (emphasis added) (citation omitted).

In the instant case, the Virginia trial court did not declare section 8.2 unconstitutional, nor did it merely erroneously interpret that section in such a manner as to exclude those buyers who no longer retained title to the purchased goods. Instead, the trial court denied Winchester's remedy under the UCC and provided Winchester with an alternate remedy—the right to sue as assignee of the homeowners—only to subsequently withdraw that right, thus depriving Winchester of either available remedy.[12] It is beyond debate that either Winchester or the townhome owners had to be considered "buyers" for the purpose of bringing suit under the UCC; nevertheless, the Virginia courts failed to recognize their standing as such. While the trial court possessed the power to interpret section 8.2, and perhaps even to do so erroneously without implicating a federal issue, it had no authority to completely eradicate Winchester's only remedy as provided by the Virginia Legislature. Further, by refusing to find error with the trial court's rulings, the Virginia Supreme Court perpetuated the due process violation; Winchester was never afforded a "*real* opportunity" to protect its statutory right to sue for damage *as a buyer of goods*. Rather, although it attempted to protect its right, and, before the JNOV, was lead to believe it had done so successfully, Winchester was given the opportunity only

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[12] Furthermore, because the ruling which operated to deprive Winchester of any and all state remedies was made pursuant to a motion for JNOV, Winchester was, in effect, deprived of its right under the Seventh Amendment to have a jury decide the merits of its claim.

to protect its right to bring suit as assignee of the town-home owners, after the issue had already been adjudicated in its favor.

In other words, like the petitioner in *Brinkerhoff-Faris,* once the trial court denied its statutory remedy in its own right, Winchester pursued the only remedy available to it, in this case as determined by the trial court, only to have that remedy quashed by the same court that granted it. Indeed, the only difference between the two cases is that here, Winchester was instructed by the trial court to pursue a remedy which was *later* found unavailable to it by that same court, whereas in *Brinkerhoff-Faris,* petitioner was told it should have pursued a remedy which the very same court had *previously* held unavailable. In both cases, the petitioners relied upon their respective court's rulings and sought to their detriment the only remedy available to them in light of those rulings. Such a course of events offends the Due Process Clause of the Fourteenth Amendment.

B. Substantive Due Process

In addition to what could be considered a procedural due process violation, as stated above, the Virginia courts' rulings also denied Petitioner its substantive due process right of access to the courts. Indeed, in a case such as this, there is significant overlap between the procedural and substantive protections provided by the Due Process Clause. The federal courts, however, disagree as to the existence, source and nature of the substantive right of access to the courts.

1. *This Court Should Resolve the Split Among the Federal Circuits Regarding the Substantive Constitutional Right of Access to the Courts.*

Some courts, such as the Fifth Circuit, hold there is a substantive right of access to the courts and acknowledge that the right of access is fundamental. Other circuits,

however, insist that the right is not fundamental, and furthermore, some federal courts refuse to recognize that there is any substantive right of access, whatsoever.

In *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983), the Fifth Circuit held that "[t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the *fundamental* rights protected by the Constitution." *Id.* at 971 (emphasis added). The court emphasized that "under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only *compelling* state interests will justify such intrusions." *Id.* at 972 (emphasis added). The *Ryland* court supported its declaration that access to the courts is a fundamental, substantive right [13] by citing to decisions of this Court which interpret the three (3) constitutional guarantees which the Fifth Circuit contends are the basis for the substantive right of access. *Id.* at 971.

The Fifth Circuit reasoned that the fundamental, substantive right of access to the courts is grounded in the Article 4 protection of the Privileges and Immunities Clause, the First Amendment right to petition the government for redress, and the Due Process Clause of the Fourteenth Amendment. *Id.* at 971-72.[14] First, the court

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[13] The language and structure of the court's opinion makes it perfectly clear that the Fifth Circuit recognizes that the substantive right of access to the courts is entirely separate from any procedural safeguards to which a litigant may be entitled. 708 F.2d at 971-72.

[14] *See Simmons v. Dickhaut,* 804 F.2d 182 (1st Cir. 1986) ("The right of access is a discrete, constitutional right, derived from various constitutional sources. It springs in part from the Due Process Clause, the Privileges and Immunities Clause, and the First Amendment. The right of access is fundamental."); *Lee X v. Casey,* 771 F. Supp. 725, 730 (E.D. Va. 1991) ("[T]he right of access to courts is an essential and fundamental right. . . . In fact, a number of courts have recognized that the right of access arises

observed that this Court has viewed the right of access to the courts as one of the privileges and immunities accorded under Article 4 of the Constitution and the Fourteenth Amendment:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but it is granted and protected by the Federal Constitution.

Id. (quoting *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142 (1907) (recognizing the right of access in the context of a diversity tort suit)). Second, the *Ryland* court observed that this Court has recognized that the First Amendment right to petition provides another basis for the substantive right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." 708 F.2d at 971-72 (quoting *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).[15] Third, the Fifth Circuit

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from several constitutional sources."); *McCoy v. Goldin*, 598 F. Supp. 310, 315 & n.4 (S.D.N.Y. 1984) (in holding that the right of access is based on the First Amendment and Due Process Clause, the court stated: "The right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any a person may hold.").

[15] *See also Alexander v. Macoubrie*, 982 F.2d 307, 308 (8th Cir. 1992) (holding that "the right to petition the court for redress of grievances" provided the constitutional basis for a law student to assert a Section 1983 action against bar examiners who allegedly conspired to prevent his former professor from representing him in suit against them); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (Section 1983 action holding that the right of access to the courts is subsumed under the First Amend-

noted that this Court has held that another constitutional basis for the right of access to the courts is the Due Process Clause. *Ryland*, 708 F.2d at 972.

> The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.

Id. (quoting *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (affirming that a state's obligation to provide legal assistance to inmates extends to civil rights actions)).[16]

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ment right to petition the government for redress of grievances); *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972) (in acknowledging that the right of access is encompassed in the First Amendment right to petition, the court stated: "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?").

[16] In *Ryland*, the plaintiffs asserted a civil rights action under Section 1983 on the grounds that the defendants, acting under color of state law as District Attorneys, knew that Shapiro killed their daughter and that they prevented a full investigation that would have revealed that Shapiro was the murderer. 708 F.2d at 969-70; *see* 42 U.S.C. § 1983 (1988) [allegation of a deprivation of a recognized federal statutory or constitutional right is required to maintain a legally sufficient civil rights claim under Section 1983]. The plaintiffs claimed that the defendants' concealment of their daughter's murder for eleven months wrongfully interfered with their access to the state courts to pursue a wrongful death claim under state law against Shapiro. 708 F.2d at 970.

The district court dismissed plaintiffs' action for lack of federal standing because it viewed the suit as an action to enforce Louisiana's criminal law and "[r]ights which derive solely from state law cannot be the subject of a claim for relief under Section 1983." *Id.* at 970. The Fifth Circuit, however, disagreed and ultimately found that the federal district court erred in dismissing the action because the plaintiffs had a substantive constitutional right of access to the courts as well as a constitutionally protected property right in the wrongful death action. *Id.* at 973. Because the federal

Likewise, in *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986), the Court of Appeals for the Fifth Circuit examined whether the alleged delay of a prisoner's appellate petition by a prison mailroom employee constituted a deprivation of a substantive constitutional right under Section 1983. After reiterating that it had characterized the right of access to the courts as "fundamental" in *Ryland*, the court held that "[a]ny deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." *Id.* at 311.

Further, the *Procunier* court rejected the defendants' argument that the "right of 'adequate, effective, and meaningful' access to the courts . . . is limited to the presentation of constitutional, civil rights, and habeas corpus claims." *Id.* The court stated that the constitutional right of access to the courts "has from its inception been applied to civil as well as constitutional claims." *Id.* Thus, in remanding the case to the district court for a finding as to the defendants' level of intent, the court concluded that if the petitioner "alleged a deliberate denial of his right of access to the courts to pursue his civil appeal, he has alleged the deprivation of a substantive constitutional right found in the First Amendment, as well as a potential deprivation of substantive and procedural due process." *Id.* at 311.

This interpretation makes sense, especially when viewed in the context of the case at bar. Citizens depend upon

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circuit court found that constitutional (rather than purely state) rights formed the basis of the plaintiffs' Section 1983 allegations, the case was remanded to the district court to assess whether the defendants' actions actually amounted to an interference with the plaintiffs' access to the courts. *Id.* On remand, however, the district court dismissed the plaintiffs' Section 1983 action because it found that there was no factual evidence demonstrating that the District Attorneys' actions after the murder interfered with the plaintiffs' access to the courts for the purposes of filing a wrongful death action. *See Ryland v. Shapiro*, 586 F. Supp. 1495 (W.D. La. 1984).

the various branches of government for a panoply of rights, privileges and protections. Where, as here, the other branches of government have plainly delegated the responsibility to the judiciary to allow a claim to be raised and pursued in a court of law, abdication of that responsibility by the court leaves the litigant with absolutely no form of legally sanctioned redress. The law says that Winchester had the right to go to court to redress a wrong—but the court nevertheless refused to entertain Winchester's claims. The Due Process Clause, at least as interpreted by the Fifth Circuit, does not permit such an unjust result.

Other federal circuits, however, have declared that the right of access to the courts is *not* a fundamental constitutional right. For instance, in *Gronne v. Abrams*, 793 F.2d 74 (2d Cir. 1986), the Second Circuit examined, *inter alia*, whether New York's use of a medical malpractice board in lieu of litigation violated the plaintiffs' due process right of access to the courts. In affirming Judge Weinstein's dismissal of the plaintiffs' action for failure to state a claim on which relief can be granted, the Second Circuit concluded that "there is no general fundamental right of access to the courts." *Id.* It reasoned that any right of access arising out of the substantive protections of the Due Process Clause only safeguard the right to assert violations involving other fundamental constitutional rights. *Id.* (citing *Wolff v. McDonnell*, 418 U.S. at 579).[17]

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[17] The *Gronne* court noted, however, that it is "well-established" that the *legislature* has the authority to abolish a common law right to sue or alter the procedures surrounding that right. 793 F.2d at 78. Thus, the court surmised that a number of courts recognize that the common law right to sue for injuries arising out of malpractice exists "only insofar as it is recognized by the courts or by statute." *Id.*

Incidently, in *Gronne*, the plaintiffs also asserted that the legislation providing for medical malpractice panels in lieu of litigation in court violated the Equal Protection Clause because the legislation

Some federal courts have gone even further in refusing to recognize the existence of a substantive right of access to the courts. For example, in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3rd Cir. 1985), the Third Circuit rejected the plaintiffs' claim that its due process rights were violated by applying a statute of limitations that effectively extinguishes claims before they can accrue. The circuit court stated: "There is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access—a reasonable opportunity to be heard." *Id.* at 555.[18] Similarly, in *Seldon v. Goodman*, 487 F. Supp. 30, 32 (S.D.N.Y. 1980), the court rejected the plaintiff's assertion that he had a substantive constitutional right of access to the courts (and judicial review of his dismissal) because his argument was "something of an overstatement" of the law. In holding that he was not deprived of access to the courts or judicial review through an error made by the defendant (a county court clerk), the district court stated that "[w]hat he at most has is a right not to be deprived by the state of such access and

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discriminated against all medical malpractice plaintiffs, and moreover, a sub-class of medical malpractice plaintiffs who were *not* exempt from litigating their claim in front of the panels based on where the action was venued. *Id.* at 76. In deciding the case on other grounds, the court left open the question of whether the statute at issue "might run afoul of the Constitution by preventing a medical malpractice plaintiff from instituting suit within a reasonable time or from *ever bringing a suit.*" *Id.* at 78. (emphasis added).

[18] In *Ciccarelli*, 757 F.2d at 554, the court also stated that it was not violative of the Equal Protection Clause to extend the discovery rule for statute of limitations to personal injury claims but not wrongful death claims. Because the court concluded that the statutory scheme did not implicate a suspect class or a fundamental right (it held that the right of access was not fundamental), the court found there was no equal protection violation because the goal of prompt settlement of the legal affairs of the dead through the classification of tort claimants satisfied the requisite lower level of review. *Id.*

review without due process of law." *Id.* The court reasoned that "[t]he most that can reasonably be required is that the state provide a mechanism for the correction of mistakes when they occur." *Id.* at 33. In summary, cases such as *Seldon* and *Ciccarelli* appear to hold that there is no substantive constitutional right of access to the courts; rather, there exists only a right not to be deprived of a day in court without the minimal level of procedural due process.

In contrast, at least one other federal circuit presented with the opportunity to decide whether there is a *fundamental* substantive right of access to the courts has failed to pass on the issue. *See Bowman v. Niagara Machine & Tool Works, Inc.*, 832 F.2d 1052, 1053 (7th Cir. 1987). In *Bowman*, the Seventh Circuit rejected the plaintiff's equal protection argument without addressing whether the right of access to the courts was fundamental because the court did not agree with the plaintiff's underlying premise that he was denied the right of access to the courts. *Id.*[19] In doing so, however, the *Bowman* court

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[19] In *Bowman*, the plaintiff argued that the Indiana statute of limitations for products liability actions (as construed by the Indiana courts) was unconstitutional because it violated his right to equal protection of the laws by impeding his access to the courts. *Id.* at 1053. A provision in the statute at issue had been interpreted by Indiana courts to require product liability actions to be filed within ten years after the product is first delivered to the *initial* user or consumer; thus, as a operator of a sheet metal press, which was purchased by his employer over forty years before his injury, the plaintiff was effectively precluded from ever bringing suit for his injuries from his operation of the press. *Id.* at 1053. The district court held that the ten-year statutory limit did not violate his equal protection rights because the provision was rationally related to a legitimate interest the state had in protecting manufacturers from certain losses due to defects in products placed in the stream of commerce. *Id.* at 1053-54. The plaintiff appealed the district court's dismissal of his suit because he claimed that, since the right of access to the courts was fundamental, the district court should have subjected the statute to strict judicial scrutiny requiring the court to find that the legislation advances a compelling state interest. *Id.* at 1054.

described the limitations on the assertion of the right of access as well as the type of substantive protections subsumed within. The court opined:

> Bowman cannot claim that he has been denied access to court simply because *the Indiana legislature* has restricted a particular cause of action in a way that makes it unavailable to him. Such an approach confuses "access" with "success," and Bowman is not constitutionally entitled to the latter. The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate *such rights as he may have,* as opposed to the extent to which rights actually are extended to protect or compensate him. . . . Bowman's claim concerns specific substantive rights that the legislature has declined to extend to a group of persons that includes him. Bowman has not alleged that he has been denied access to either state or federal courts to enforce any right that *has* accrued to him. [¶] Because the judicial process is open to him, even if the cause of action he would pursue is not, we conclude that Bowman has failed to present a claim of denial of access to courts by operation of [the Indiana statute].

Id. at 1054-55 (first emphasis added; second and third emphasis in original).

Winchester respectfully submits that the facts in this case, unlike *Bowman,* provide this Court with the opportunity to clarify, confirm and explicate the existence of the substantive right of access to the courts. Namely, in those situations where the legislature has conferred on all citizens a statutory right to bring a cause of action to enforce certain rights, the judiciary may not, via a decision regarding standing or otherwise, completely deny a litigant of his right of access to enforce those rights in the courts without a high degree of justification. In other words, Winchester contends that, at least where a party seeks to have access to the courts to raise statutorily-

provided rights, there is a substantive right of access to the courts, and more importantly, that substantive right of access is fundamental in nature. Winchester does not stand before this Court asking for the right of "success" as the Second Circuit suggested in *Bowman*; it merely requests that this Court acknowledge that Winchester and similarly situated parties are entitled to exercise a substantive right of access to the courts to at least have the chance to "vindicate such rights as [they] may have." *See Bowman,* 832 F.2d at 1054-55.

Federal courts such as *Seldon* and *Ciccarelli* that appear to refuse even to recognize the existence of the substantive right of access to the courts are misguided by the belief that the right of access is derived solely from the procedural safeguards of the Due Process Clause of the Fourteenth Amendment. As the Fifth Circuit has observed, the right of access to the courts is derived from multiple constitutional sources and the right provides both substantive and procedural protections. That is not to say, however, that the due process cases which discuss the fundamental nature of the right are not helpful to the analysis here. To the contrary, the next section examines this Court's decisions which examine the right of access to the courts in a due process context and provide additional support for Winchester's contention that the substantive right of access to the court, where applicable, is indeed fundamental.

2. *Under the Due Process Analysis in* Boddie *and* Kras, *Winchester's Denial of Access to the Courts to Maintain a Cause of Action Authorized by the State Legislature Constitutes a Deprivation of a Fundamental, Substantive Right.*

This Court's prior decision relating to the right of access to the courts in *civil* cases have been extremely narrow insofar as they discuss only whether there was a constitutional right to bring a specific kind of civil action

(*i.e.*, divorce or bankruptcy).[20] In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that the indigent petitioners in that case were unconstitutionally deprived of their access to the courts by state-imposed fees which effectively barred them from bringing their actions for divorce. *Id.* at 380. Justice Harlan reiterated that the Court had previously held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. He further explained:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording

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[20] In the criminal context, this Court has recognized that a prisoner's substantive right of access to the courts is a fundamental right. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he *fundamental* constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.") (emphasis added); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (in striking down a regulation which prohibited prisoners from helping each other with habeas corpus applications, this Court stated that "it is *fundamental* that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.") (emphasis added).

> all citizens access to the means it has prescribed for doing so.

Id. at 382-83. In his reasoning, Justice Harlan further emphasized that the petitioners pursuit of the dissolution of a marriage carried special weight:

> [M]arriage involves interests of basic importance in our society. It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. . . . [W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Id. at 376.[21]

On the other hand, in *United States v. Kras,* 409 U.S. 434, 444-45 (1973), this Court declined to extend the right of access to an indigent seeking a discharge in bankruptcy because it did not find that the elimination of the indigent's debt burden rose to the same constitutional level of the dissolution of the marriage in *Boddie.* Justice Harlan stated:

> In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. . . . [¶] [A] debtor, in theory, and often in actuality, may adjust

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[21] *See also Doe v. A Corp.,* 709 F.2d 1043, 1048 (5th Cir. 1983) (in discussing right of a lawyer to bring a claim against a former client, the court stated that "[w]hile the *Boddie* principle does not give any broad 'right' of access to federal court, the courtroom door should not lightly be barred to a person who has a tenable legal claim.").

> his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer. Government's role with respect to the private commercial relationship is qualitatively different from its role in the establishment, *enforcement,* and dissolution of marriage.

Id. at 445 (emphasis added). Subsequently, this Court characterized its holding in *Kras* as follows: "[W]e agreed that a due process right of access to the courts exists when fundamental interests are present and the State has exclusive control over 'the adjustment of [the] legal relationship[s].' " *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 n.5 (1982) (observing that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause) (quoting *Kras,* 409 U.S. at 445).[22]

Winchester recognizes that this Court's due process decisions do not yet hold that there is a broad fundamental, substantive right of access to the courts for all civil litigants regardless of the cause of action. This case, however, fits within the due process right of access identified by this Court in *Boddie* and *Kras,* since Winchester was compelled by state law to seek relief in the state court for the injuries it incurred.

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[22] It is also important to note that in explaining the "analogous" relationship between the reasoning used in analyzing the due process right of access to the courts in *Boddie* and the procedural due process issues in *Logan,* this Court provided the following standard for reviewing those instances where the State deprives an individual of a protected property interest without the proper degree of due process:

> [W]hile the right to seek a divorce may not be a property interest in the same sense as is a tort or a discrimination action, the theories of the cases are not very different: having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.

Logan, 455 U.S. at 430 n.5.

Winchester accepts this Court's assertion in *Boddie* and *Kras* that the creation and rescission of a commercial contract can be completed without judicial assistance; however, the *enforcement* of rights created by statute—like the dissolution of a marriage contract—can only be achieved through the courts. In fact, the only way to seek redress under applicable Virginia law was for Winchester to file this lawsuit. It logically follows that the right of access to the courts must be deemed fundamental in this instance because the state courts have the exclusive legal control over the enforcement of Winchester's and the homeowners' legal relationship with the Respondents. Winchester must be provided with access to the courts to enforce its rights arising from its dealings with Respondents under a state-created cause of action because, unlike the bankruptcy petitioner in *Kras,* it has no other means of enforcing its rights. Hence, denial of Winchester's substantive right of access to pursue its statutorily provided cause of action is the deprivation of a fundamental right. The trial court's standing decisions should therefore be subjected to a high level of constitutional scrutiny by this Court under a substantive due process analysis.[23]

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[23] As in its substantive due process claim, if the right of access to the courts is, by itself, deemed fundamental, then the judicial act which deprived one class of such a right, while affording the right to other classes, would subject that act to a high level of constitutional scrutiny on equal protection grounds. Due to the Virginia courts' disregard of Virginia law, certain buyers of goods are treated differently than other buyers of goods. If Winchester lacked the standing to recover under the initially pleaded UCC and common law causes of action as a buyer of the FRT plywood, because those goods had already been transferred to the homeowners at the time that the suit against Respondents was brought, and if Winchester could not recover under the remaining causes of action as an assignee of the homeowners because the FRT plywood was deemed "realty" once it was incorporated into the roofs of the townhomes, then two classes of buyers of defective goods were effectively precluded from asserting a claim against Respondents: (1) a party such as Winchester who purchases a good such as

II. THE ISSUES PRESENTED ARE OF SUBSTANTIAL PRACTICAL IMPORTANCE.

While there may be room to debate whether or not there is indeed a "proliferation" of products liability cases across America, and the purported benefits and/or detriments of those cases, it cannot be said that under our constitutional system of tripartite government access to the courts is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Very little commerce is any longer local in nature; indeed most commerce is national, if not global, in scope. The majority of the states have adopted the Uniform Commercial Code in one form or another, and the products at issue in this case, as with most building products, were not sold and used only in Virginia. It is therefore important that this Court determine and explain whether or not all citizens enjoy a fundamental right of access to the courts.

CONCLUSION

The judgment below produces an extraordinary result. Respondents' FRT plywood has been found defective and the jury which considered the evidence found in favor of Winchester. Yet the lower courts' rulings have deprived the buyer, consumer, and user of the defective FRT plywood of their cause of action under Virginia law, thus allowing the manufacturers and sellers of the FRT plywood to wholly avoid liability in tort, contract, and by statute.

This is not a matter for action by the state legislature. The legislature long ago did its job by providing a statute to enforce contractual rights like Winchester's. The Virginia judiciary should have allowed Winchester its right-

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FRT plywood for future incorporation into homes which are later sold; and (2) the owner of a home in which the defective good is ultimately incorporated. Thus, the trial court's denial of standing also could give rise to an equal protection claim by Winchester.

ful opportunity to enforce that right by trying the case it originally plead, or at the very least, by recognizing the jury verdict obtained by Winchester as the assignee of the homeowners' rights. Winchester's pleadings were ignored, and the resulting denial of Winchester's standing, in its own right and as assignee of the homeowners, deprived Winchester of its fundamental right of access to the courts.

The constitutional safeguards in the American system of jurisprudence are designed to ensure that the courthouse door is open to everyone with a legitimate claim. Yet, despite this basic premise, access to the Virginia state courts has been unconstitutionally denied to Winchester.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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